United States Department of Labor
Employees' Compensation Appeals Board

G.R., Appellant	)	
and	)	**Docket No. 08-1627**
	)	**Issued: May 5, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Dayton, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 20, 2008 appellant filed a timely appeal from the merit decisions of the Office of Workers' Compensation Programs dated October 9, 2007 and April 21, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that the constructed position of information clerk represented appellant's wage-earning capacity.

FACTUAL HISTORY

On December 16, 1994 appellant, then a 39-year-old mail handler, filed a claim for compensation for a traumatic injury. This claim, filed on his behalf by an injury compensation specialist, included a witness statement indicating that, as he was crossing over a hand rail, his left foot touched the floor and slid away from him and he fell backwards with his right leg under him. On February 14, 1995 the Office accepted appellant's claim for a right leg fracture with surgical repair. Appellant had surgery on the date of the incident, December 16, 1994, and this

was followed by surgeries on July 6, October 17 and December 6, 1996 and October 25, 1997. He returned to work following each surgery in a modified-duty position, but he stopped work on April 30, 1999 and did not return. On September 14, 2001 appellant underwent a total right knee arthroscopy.

On September 28, 2004 Dr. James C. Bunski, appellant's treating orthopedic surgeon, completed a work capacity evaluation indicating that appellant may be able to work two to four hours a day. He noted restrictions of sitting and operating a motor vehicle at work limited to two hours, walking and twisting limited to one-half hour and standing limited to one to two hours. Dr. Bunski noted that appellant could only push, pull and lift 10 to 20 pounds, limited to one-half hour each per day.

By letters dated April 18 and September 26, 2006, appellant was requested to have his attending physician complete a periodic medical report. A "Dear Doctor" letter was attached to each for completion by his physician. In response, appellant submitted a work capacity evaluation completed by Dr. Bunski on October 20, 2006 indicating that he could work two hours a day. Dr. Bunski noted sitting was limited to two hours and that walking and standing was limited to one-half hour each a day. He indicated that appellant could not do any work involving pushing, pulling, lifting, squatting, kneeling and climbing. Appellant also returned a copy of the September 26, 2006 "Dear Doctor" letter wherein responses were handwritten indicating that the physician last saw appellant on October 20, 2006, that he had permanent restrictions and referring to an attached treatment plan. This document is not signed or dated. It appears to be attached to the aforementioned work capacity evaluation by Dr. Bunski.

By letter dated November 7, 2006, the Office referred appellant to Dr. Aivars Vitols, an osteopath, for a second opinion. In a medical opinion dated November 29, 2006, Dr. Vitols opined that appellant "sustained a severe intraarticular displaced tibial plateau fracture during the course of employment." He noted that appellant's current complaints and objective findings are a direct result of the injury of December 14, 1004 and "the subsequent development of post-traumatic arthritis and need for joint replacement." Dr. Vitols noted that appellant had limited capabilities if returned to active employment, but that he could function in a sedentary position for eight hours per day. He listed appellant's restrictions as walking and standing for a maximum of two hours each, sitting four hours a day with the ability to change position as needed. Dr. Vitols noted no residual capacity of being able to carry or lift materials, but that he should avoid repetitive use of stairs. He noted that appellant did not have the capability of kneeling or squatting and should not operate a motor vehicle at work.

By letter dated December 21, 2006, the Office asked Dr. Bunski to comment on the report of Dr. Vitols. It received no timely response.

On March 5, 2007 the Office referred appellant to vocational rehabilitation services. In a statement dated June 19, 2007, appellant indicated that he was taking medication for depression, high blood pressure, heart and soon may be taking medication for diabetes. He indicated that he had been increasing his pain medication due to overuse of his right knee joint and that he was having increasing problems with his left knee and arthritis in his left shoulder. Appellant contended that these problems were all the result of the work injury of December 14, 1994. He noted that the vocational counselor was directing him towards jobs with the elderly or phone

centers. Appellant believed that he could not deal with the elderly due to his limitations and depression and that he did not want to work at a call center because he did not like receiving calls from phone centers. He also contended that there were not many jobs in the "depressed area of Dayton, [Ohio] that fit my limitations."

In a July 10, 2007 report, the vocational counselor indicated that appellant has been unsuccessful in finding gainful employment during his 12 weeks of job search and that it was her professional opinion that appellant was not motivated to find employment. She contended that appellant was marketable and that there were plenty of part-time jobs available. The vocational counselor noted that appellant repeatedly stated that he was too depressed to find employment, applied for jobs at companies that do not exist, applied for jobs outside his restrictions and did not like many of the positions provided on his behalf. She noted that appellant's placement file was being closed due to the fact that he was unsuccessful in finding employment. In a July 23, 2007 report, the vocational counselor indicated that positions as a telephone solicitor and information clerk were available in sufficient numbers within appellant's commuting area at wages of $358.40 and $577.20 per week, respectively.

On August 23, 2007 the Office sent appellant a notice of proposed reduction of compensation, wherein it indicated that appellant had a wage-earning capacity of $577.20 per week. It instructed appellant to submit additional evidence or argument within 30 days if he disagreed with this proposal. No response was timely received by appellant.

On October 9, 2007 the Office issued a decision finalizing the proposed reduction of compensation, noting that appellant's wage-earning capacity was represented by the position of information clerk.

By letter dated October 12, 2007, appellant, through his attorney, requested an oral hearing. At the hearing held on February 20, 2008, appellant discussed his injury, noted that he could not work at the employing establishment in his condition, noted that he applied for several other positions but was not given any job opportunity and stated that he was still looking for work within his restrictions.

In an April 8, 2008 work capacity evaluation, Dr. Bunski indicated that appellant could work two hours a day with sitting limited to two hours and walking and standing limited to one-half hour each. He noted that appellant could not perform the following activities: pushing, pulling, lifting, squatting, kneeling and climbing. Appellant also submitted an attending physician's report completed by Dr. Bunski on April 8, 2008 indicating that appellant had post-traumatic osteoarthritis in his right leg and that it was undetermined when he could resume regular employment. Dr. Bunski listed appellant as totally disabled from February 15, 1994 through November 4, 2008.

By decision dated April 21, 2008, the hearing representative affirmed the October 9, 2007 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] The burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[2]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[3] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[4] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[5]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[6]

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[7]

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[1] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[2] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[3] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[4] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[5] *Id.*

[6] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[7] 5 U.S.C. § 8123(a).

ANALYSIS

The Board finds that this case is not in posture for decision. In finding that the position of information clerk represented appellant's wage-earning capacity, the Office improperly gave decisive weight to the opinion of the second opinion physician, Dr. Vitols. There was an unresolved conflict between the opinion of appellant's treating physician, Dr. Bunski, and the opinion of the second opinion physician, Dr. Vitols. Dr. Bunski opined that appellant was only capable of working two to four hours per day and had restrictions of two hours of sitting, that walking and standing were limited to one-half hour a day and that appellant could perform no pushing, pulling, lifting, squatting, kneeling and climbing. Dr. Vitols opined that appellant also had restrictions, but they were not as limiting. He opined that appellant was capable of working an eight-hour day and could walk and stand two hours a day, sit four hours a day and that he could carry and lift materials. Due to this conflict with regard to appellant's restrictions, the Office should have referred appellant to an impartial medical examiner.[8] Because there remains an unresolved conflict in the medical opinion with regards to appellant's work restrictions, the Board finds that the Office did not meet its burden of proof to issue a loss of wage-earning capacity decision.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation. The case will be remanded to it for further development of the medical evidence and for referral to an impartial medical specialist to resolve the conflict of medical opinion.

[8] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated April 21, 2008 and the October 8, 2007 Office decision are reversed and the case remanded for further action consistent with this decision.

Issued: May 5, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board